

*a***MAYBAN FINANCE BHD****v.****MOHD JAFARI ARIFFIN***b*

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[SUIT NO: MT(2) 22-24-1999]
27 MARCH 2003

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CONTRACT: *Guarantee - Guarantor - Whether guarantee cover secured from guarantor before disbursement of credit facility - Whether a requirement to commence action first against guarantor before suing defendant*

CONTRACT: *Security - Deposit of money - Security for disbursement of credit facility - Whether there was non-observation of condition of facility*

d

CONTRACT: *Claim for money lent - Demand for payment - Whether prior written demand a pre-requisite to commencement of action*

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The defendant obtained a credit facility from the plaintiff for a sum of RM300,000. As security for the disbursement of the loan, a sum of RM60,000 was required to be deposited with the plaintiff under a particular account. Subsequent to the defendant's default in servicing the full loan, the plaintiff filed this suit against the defendant, demanding the full sum and its interest owing, together with costs.

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The issues that arose for determination were whether: (i) the plaintiff failed to secure a guarantee cover by one Credit Guarantee Corporation Malaysia Berhad ('CGCMB') before the disbursement of the facility; (ii) any disbursement, prior to the depositing of the said RM60,000 was construed as a non-observation of a condition of the facility; (iii) the plaintiff should have sent a notice to terminate the facility upon the defendant's default in servicing the loan; and

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(iv) whether the plaintiff should have claimed from CGCMB before taking action against the defendant.

Held:

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[1] One of the securities for the facility was a guarantee cover by CGCMB, which was also a condition precedent to the disbursement of the facility. It was an agreed fact that there was a guarantee by CGCMB. Further, there were two disbursements of the facility made to the defendant. On these facts, the disbursements must have been made after the guarantee

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cover had been procured. There was no evidence adduced on the failure of the plaintiff to procure the guarantee cover before the disbursement of the facility. (pp 265 d, h-i & 266 a)

[2] Since the defendant was unable to deposit the RM60,000 as security for the disbursement of the loan, the plaintiff's branch manager, upon exercising his discretion conferred by the loan facility, had allowed the defendant to set-off the RM60,000 from the facility granted. That sum was subsequently deposited with the plaintiff under the defendant's name. The plaintiff's branch manager was only exercising his discretion in relaxing the pre-requirement of the loan facility. Furthermore, the plaintiff had the absolute right to waive any of the conditions precedent set out, prior to the disbursement of the facility. There was no reason that the defendant should be allowed to complain, especially since the whole sum had been disbursed to him. (pp 266 f-h & 267 d)

[3] There was no requirement on the part of the plaintiff to issue any written demand prior to the filing of this suit. A relevant clause under the facility conferred the plaintiff the discretion to terminate the loan agreement, should there be any default in the payment, whether formally demanded or not. (p 270 f-g)

[4] There were no provisions in the loan facility to necessitate the plaintiff that in the event of default, it was required to commence the action first against the guarantor (CGCMB), before suing the defendant. Thus, the plaintiff was at liberty to sue the defendant at any point of time, as provided for by a default clause under the loan facility. (p 272 c)

[Plaintiff's claim allowed with costs.]

Case(s) referred to:

Bank Bumiputera Malaysia Bhd Kuala Terengganu v. Mae Perakayan Sdn Bhd & Ors [1993] 2 CLJ 495 (**refd**)

NM Rothschild & Sons (Singapore) Ltd & Ors v. Rumah Nanas Rubber Estates Sdn Bhd [1988] 2 MLJ 201 (**refd**)

Southern Bank Bhd v. Shin Huat Joo Enterprise Sdn Bhd & Ors [1998] 3 CLJ 941 HC (**refd**)

For the plaintiff - Wan Azman; M/s Lua & Mansor

For the defendant - Zainal Abidin; M/s Zainal & Mariani

Reported by Raja Vishnu Sivarajah

*a***JUDGMENT****Suriyadi Halim Omar J:**

b The plaintiff in this case was a finance company whilst the defendant was a medical practitioner practicing under the name and style of Klinik Bharu Machang at Lot 685, Jin Bakat, 18500 Machang, Kelantan. On 24 March 1999 the plaintiff had filed this suit against the defendant for a sum of RM334,636.08 as at 7 March 1999 together with interest at the rate of 2% above the base lending rate (BLR 9.5%) p.a. on a daily rest basis from 8 March 1998 until full and final settlement, and of course costs. Having considered the submissions and arguments of counsel for the plaintiff and defendant, supplemented by the authorities supplied, I was satisfied that the plaintiff indeed had successfully proved its case against the defendant. I accordingly allowed the claim with costs.

Facts Of The Case

d The defendant had applied for credit facility from the plaintiff, and on 1 January 1997 a sum of RM300,000 under a facility known as Revolving Fixed Facility was approved. The defendant subsequently signed a letter of offer (exh. P3), accepting the terms and conditions imposed by the plaintiff. Pursuant to this offer, a loan agreement was executed between them on 16 January 1997. The full terms and conditions of the facility were stipulated in the agreement, marked as exh. P5.

e A guarantee scheme, known as the Credit Guarantee Corporation's New Principal Guarantee Scheme (NPGS), in respect of the above facility, was also obtained by the plaintiff from Credit Corporation Malaysia Berhad, as a guarantee for the due payment and discharge of the liabilities of the defendant (dated 12 December 1996 and marked as exh. P6).

f On 16 January 1997 the defendant wrote a letter requesting for the utilisation of the facility, for the sum of RM220,000 (exh. P9). In response to that letter, the plaintiff issued two cheques to the defendant, viz. MBB No: 3314430 and 314431 for RM60,000 and RM160,000 respectively (as per letter dated 19 January 1997 marked as exh. P10). As security for the disbursement of the loan, a sum of RM60,000 was required to be deposited with the plaintiff under an account called Al-Mudharabah General Investment Account Certificate, together with the duly executed letter of lien and set-off (the certificate being marked exh. P1). On 27 January 1997 the defendant had written a letter (exh. P11) requesting the withdrawal of the balance sum of RM80,000, whereupon on 28 January 1997 the plaintiff had issued a cheque bearing number MBB No. 318357 for that sum (exn. P12). The defendant defaulted in servicing

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the full loan and a letter of demand dated 13 March 1999 was sent to the defendant demanding a sum of RM334,636.08 (exh. P14). a

Issues In Dispute

The defendant in his defence had raised some pertinent issues in relation to the terms and conditions of the letter of offer (exh. P3) and the loan agreement (exh. P5). For easy understanding and appreciation of the issues, I shall deal with them separately, and in the following manner: b

A. Whether there was failure on the part of the plaintiff to secure the guarantee cover by Credit Guarantee Corporation Malaysia Berhad [CGCMB] before the disbursement of the facility. c

One of the securities for the facility was a guarantee cover by Credit Guarantee Corporation Malaysia Berhad, which was also a condition precedent to the disbursement of the facility (cl. 5.01(e) of exh. P5). It was an agreed fact that there was a guarantee by CGCMB dated 12 December 1996. It was tendered through PW2 and marked as exh. P6. The latter (PW2) in his testimony indeed had agreed that one of the pre-conditions for the disbursement of the loan facility was the guarantee cover by CGCMB. Clause 5.01 of the loan agreement (exh. P5) talks of the conditions precedent for the disbursement and it reads: d

The following events are specified as conditions precedent to the disbursement of the part of the Facility. The obligation of the Lender to make any disbursement of the Facility is subject to the fulfillment, in the manner satisfactory to the Lender, prior to the making of any disbursement, of the following conditions: e

a ... f

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e. the Borrower shall procure the execution of Guarantee Cover by Credit Guarantee Corporation Malaysia Berhad (CGCMB) for an amount of Ringgit Malaysia Two Hundred Forty Six Thousand (RM246,000) only and g

According to the evidence of PW2, the first disbursement of the facility to the defendant was made on 19 January 1997 for the sum of RM220,000. This was evident from exh. P9 (request letter by defendant dated 16 January 1997), and exh. P10 (plaintiff's letter dated 19 January 1997 which had enclosed two cheques). The second disbursement was made on 28 January 1997 in the sum of RM80,000 upon the defendant's request (see exh. P11 and exh. P12). h

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a Based on the above facts, I had concluded that the disbursements must have been made after the guarantee cover had been procured. There was no evidence adduced before the court of the failure of the plaintiff to procure the guarantee cover before the disbursement of the facility.

b *B. Whether any disbursement, prior to the depositing of the Al-Mudharabah General Investment Account Certificate of RM60,000, together with the duly executed letter of lien and set-off, was construable as a non-observation of a condition in the agreement*

c The defendant had submitted that the plaintiff had failed to observe the condition in cl. 4.03 of the loan agreement (exh. P5). Clause 4.03 states as follows:

d In addition to the security described in Clause 4.01, the Borrower shall have caused and deposited with the Lender under the Al-Mudharabah General Investment Account Certificate(s) of Ringgit Malaysia Sixty Thousand (RM60,000.00) only under lien throughout the duration of the facility together with the Letter of Lien and Set-off in the form and substance required by the Lender as stated in Clause 5.01 hereof.

e According to the defendant, he did not pay any deposit nor give his consent to the plaintiff to deduct the amount of RM60,000 from the facility sum, to be deposited as security under the Al-Mudharabah General Investment Account Certificate. The defendant also denied signing the letter of set-off (exh. P2). The plaintiff's witness, PW1 in his evidence confirmed that he prepared and processed the Al-Mudharabah General Investment Account Certificate (exh. P1), and also the letter of set-off (exh. P2). He testified that the defendant signed the letter of set-off before him.

f Under cl. 4.03 of exh. P5, the defendant was required to deposit a sum of RM60,000 with the plaintiff, prior to the release of the facility. However, as confirmed by the defendant himself, he had no such amount and was unable to deposit that sum as required under cl. 4.03 of the agreement. In helping out the defendant to come up with such a large sum of money at that time, the plaintiff's branch manager (PW3) had testified that, upon exercising his discretion under cl. 5.01 of exh. P5, the defendant was allowed to set-off the above amount from the facility granted. That sum was subsequently deposited with the plaintiff under the defendant's name, as security for the loan. Under the latter cl. of 5.01, it was provided that the plaintiff had the absolute right to waive any of the conditions precedent set out under the said clause, prior to the disbursement of the facility. The relevant portion of the said clause read as follows:

i The Lender reserves the absolute right to waive any of the conditions precedent set out in this clause. Any such waiver shall be on such terms and conditions

(if any) as the Lender may agree (including without limitation, terms and conditions as to subsequent fulfillment of the relevant condition or the imposition of any alternative condition) and any failure on the part of the Borrower to fulfill any term or condition notified to it by the Lender in relation to any waiver shall be treated for purpose of this Agreement as breach of an undertaking contained in this Agreement.

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One of the conditions precedents that could be waived by the plaintiff before making the disbursement to the defendant, was as set out in cl. 5.01(d), and it reads:

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the Guarantee and all other security documents shall have been duly executed and stamped.

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PW3 was only exercising his discretion in relaxing the pre-requirement of the loan agreement. If the plaintiff were to adhere strictly to the steps to be taken, before the money could be disbursed, the defendant would certainly have not been able to utilise the facility that had been approved by the plaintiff. Why should the defendant be allowed to complain when the whole sum had been disbursed to him? And now he has used his own failure, and the act of kind-heartedness of PW3 as one of his defences. The case of *Bank Bumiputera Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 CLJ 495 would certainly be of some assistance here. In that case, the bank had given an overdraft facility to the first respondent, Mae Perkayuan [MP] for a sum of RM4,500,000. Two years later the bank withdrew the facility and demanded repayment of the outstanding sum together with interest. The bank filed their case in the High Court and MP filed its counterclaim against the bank. The learned trial judge had found that the bank had committed a breach of the bridging loan agreement, and had accordingly dismissed the bank's claim against the respondent. Further to that, the court allowed MP's counterclaim and awarded damages against the bank. Being dissatisfied the bank appealed.

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On appeal to the Supreme Court, the appeal was allowed in part. In that case Abdul Hamid Omar LP had occasion to remark:

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We consider that the bank was not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent is not obliged under the agreement to pay interest during the bridging period.

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Under the circumstances, we find that the bank had in recalling the loan mid term committed a breach of the agreement contained in exh. P2 and we accordingly affirm the learned trial judge's decision on this issue.

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a Further, at p. 505 paras. e to f (left hand side), it was said as follows:

The dismissal of the bank's claim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The bank's claim for recovery of the loan was an entirely separate matter from the first respondent's claim for damages against the bank. There is no ground in law for exempting the first respondent from liability to repay the loan.

c The evidence in this case clearly showed that the defendant was in need of the facility from the plaintiff, with the agreement (exh. P5) being entered into on 16 January 1997. The defendant had requested for the release of the money of RM300,000 (including RM60,000 as security deposit) on the latter date and on 28 January 1997. There was no allegation that the plaintiff had, in contravention of any clause of the agreement (exh. P3 or P5) had released the loan, to the detriment of the defendant. The conditions precedent provided for in the agreement indisputably was also for the benefit of the banks, and they were entitled to waive them, if they so wish (*NM Rothschild & Sons (Singapore) Ltd & Ors v. Rumah Nanas Rubber Estates Sdn Bhd* [1988] 2 MLJ 210).

e *C. When in breach of the agreement by the defendant, whether the plaintiff should have sent a notice to terminate the facility.*

f It was not disputed, and supported by evidence, showed that a notice of demand was issued, as the defendant had not paid the interest installments due on the amounts, disbursed by the plaintiff. The defendant also had admitted this fact. According to PW2, the defendant had defaulted in paying the interest for three consecutive months from 1 January 1999 until March 1999. It was a term and condition of the agreement (exh. P5), among others that the tenure for the repayment of the loan was for a period not exceeding 72 months.

g It was agreed that the facility granted was on a revolving and continuous basis, for a maximum period of twenty-four months (cl. 3.01). The defendant was only required to initially service the monthly interest charged by the plaintiff. Thereafter, the defendant was to pay the facility by forty eight fixed equal monthly installments of RM8,012, or such other amount as may be determined by the plaintiff from time to time, until the whole of the facility with interest had been fully paid and satisfied. The defendant had admitted that he had failed to pay the interest installments as scheduled, namely from 31 January 1999 to March 1999 (exh. P21).

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It was the defendant's contention that the plaintiff had breached the terms and condition of the agreement, in particular that of cl. 9.01(g) (exh. P5), regarding the written notice of demand. The defendant had argued that cl. 9.01(g) required the plaintiff to send a notice of demand, and a termination letter for the loan facility. Since none was undertaken, the agreement was still in force and the claim for the whole sum thus was premature. To answer the above poser the following question had to be answered ie:

whether a notice of demand was a pre-condition in this case?

In the letter of offer (exh. P3) and the loan agreement (exh. P5), there were certain "events of default" being agreed upon by the plaintiff and defendant, of which some relevant clauses in both documents would be considered. Events of default in the letter of offer (exh. P3) were stated as follows:

We shall be entitled to terminate the facility and recover the entire outstanding amounts due to us should any of the following occur:

- i. You fail to pay on demand being made by us any moneys payable under this facility.
- ii. You fail to pay on the due date any interest payable under this facility.
- iii. You fail to make payment of installment or any amount due to us within the specified date.
- iv. – vii

In clause 9.01 of exh. P5, *inter alia*, were the following relevant provisions:

9.01 Events Of Default.

The lender may without prejudice to any of its other rights, **terminate its commitment** and all of its obligation under this agreement, and the facility and any interest thereon **and all other moneys costs** and expenses **payable by the Borrower thereunder shall immediately become due and payable and the Lender shall** immediately become entitled to **resort to its securities** hereunder (all or any and in whichever order of realization the lender may choose **and without diligence**, resentment, protest, **demand and/or notice of any kind which the borrower hereby expressly waives and to exercise all or any right and remedies** thereunder if:

- a. **the borrower shall default in the payment to the lender of the facility or interest** as aforesaid or any other moneys herein covenanted to be paid after the same shall have become due by the borrower to the lender whether formally demanded or not;

- a* b. the Borrower makes default in the due performance or observance of any of the other terms and conditions hereof if such default is in the opinion of the lender incapable of remedy, such default continues unremedied for fourteen (14) days after notice thereof has been given by the Lender to the Borrower.
- b* c. the Borrower commit or threatens to commit a breach of any term, stipulation covenant or undertaking herein contained or any guarantee agreement or such other agreement or security document between the Lender and the Borrower or such other party and executed pursuant to or referred to in this Agreement and on its part to be observed and performed and in the opinion of the Lender has failed to remedy or take adequate steps to remedy the same within fourteen (14) days after notice from the Lender (emphasis added).
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The relevant portion for my consideration were as follows:

- d* The lender may ... terminate its commitment ... and ... moneys ... payable by the Borrower thereunder shall immediately become due and payable and the Lender shall ... resort to its securities ... (and without ... demand and/or notice of any kind which the borrower hereby expressly waives and to exercise all or any right and remedies ... if:
- e* a. the borrower shall default in the payment to the lender of the facility or interest

Having considered the relevant clauses in the letter of offer and also the loan agreement, I found that there was no requirement on the part of the plaintiff to issue any written demand prior to the filing of this suit (albeit one was sent).

- f* The provision was clear in that the plaintiff could terminate its entire commitment and obligation under the agreement, if any of the events of default were to occur. A relevant clause applicable in the circumstances of this case was cl. 9.01(a). It conferred on the plaintiff the discretion to terminate its commitments and obligations under the agreement, should there be any default in the payment of the facility or interest whether formally demanded or not.
- g* Not only was there no prohibition/or any condition imposed on the plaintiff when it desired to terminate the agreement before commencing this action for the whole sum, but by agreement the defendant had waived that requirement, even if it did exist.

- h* The plaintiff's commitment and obligation in this case was to provide the money, and to disburse it according to the terms and conditions of the agreement. The whole amount of RM300,000 evidentially had been disbursed to the defendant, in accordance with his request (see exh. P9, P10, P11, P12 and P17). Further, the plaintiff had given him ample time and chance to settle
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the arrears of his installments. In fact the defendant knew of his failure to service the charged interest. A reminder letter was also sent to him as per exh. P22, and on 3 March 1999 as the defendant was unrepentant the plaintiff had issued a notice of demand (exh. P14). Despite that the defendant had still defaulted in his payments, and had failed to regularise his payments to the satisfaction of the plaintiff. That being so, I was convinced that the plaintiff was entitled to pursue with this case in accordance with its rights and discretions provided for in the loan agreement (exh. P5).

If I may reiterate, it was not a pre-condition that the plaintiff must formally terminate the agreement, as the latter was silent on its requirement. It was also confirmed by the plaintiff's witness PW2, that the facility granted in this case was not an 'on demand' facility. It was crystal clear under cl. 9.01(a) of exh. P5, that in the event of default by the defendant, the plaintiff could exercise its discretion to terminate its commitments and all or any of its obligations, whether formally demanded or not (*Southern Bank Bhd v. Shin Huat Joo Enterprise Sdn Bhd & Ors* [1998] 3 CLJ 941). Here, as said earlier the plaintiff had clearly fulfilled its commitments and obligations under the agreement, by releasing the whole amount of the facility as requested by the defendant. Thereafter, it was the defendant's obligation to observe the terms and conditions stipulated in the agreement, failure of which the plaintiff could exercise all or any of its rights and remedies provided for in the agreement.

In comparison, the situation would be very much different if the termination were to fall under cl. 12.01 of the agreement, under which the plaintiff could terminate the agreement, by rescinding the facility by notice in writing to the defendant if, before the disbursement of the facility the defendant were to fail to perform or observe all or any of the covenants, stipulations and conditions contained in it.

D. Whether the plaintiff should claim from CGCMB before taking action against the defendant

A guarantee cover by Credit Guarantee Corporation Malaysia Berhad (CGCMB) (exh. P6) was a pre-condition for the disbursement of the facility. As stated in the letter of offer (exh. P3) and the loan agreement (cl. 4.01 of exh. P5), the borrower shall procure the execution of a guarantee cover by CGCMB for an amount of RM246,000. Based on that letter of offer and/or the loan agreement, there was no provision requiring the plaintiff to proceed first against the guarantor (CGCMB) before suing the defendant. The purpose of the guarantee (exh. P6), was to ensure or guarantee the due payment and discharge of the liabilities of the borrower (defendant), to the lending institution (plaintiff) in respect of the credit facility granted.

- a* According to PW4, the plaintiff had submitted their claims to the guarantor (CGCMB) but until the hearing of this case, they were yet to be paid. By analogy, I refer to the case of *Southern Bank Bhd v. Shin Huat Joo Enterprise Sdn Bhd & Ors (supra)* where it was stated that it was settled law that creditors could commence action against guarantors simultaneously with foreclosure proceedings.
- b* The lenders were at liberty to choose whatever cause of action they desired, so long as no provisions had been inserted in their agreements, preventing enforcement of that choice. To wind up, after perusing the letter of offer (exh. P3), the loan agreement (exh. P5) and the guarantee letter (exh. P6), these documents contained no provisions requiring that in the event of default, the plaintiff was required to commence the action first against the guarantor (CGCMB), before suing the defendant. In such absence, the plaintiff was at liberty to sue the defendant at any point of time, as provided for by the default clause of 9.01(a) of the loan agreement.
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- d* For the reasons stated above, I therefore had allowed the plaintiffs claim with costs.
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